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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 CLIMACO LOPEZ,

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13 Petitioner,

14 v.

15 RAYMOND HADDEN, Warden,

16
17 Respondent.
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Case No. 15cv2810-BTM (JLB)

ORDER:

**(1) ADOPTING AS MODIFIED THE
FINDINGS AND CONCLUSIONS OF
UNITED STATES MAGISTRATE JUDGE;**

**(2) DENYING PETITION FOR A WRIT
OF HABEAS CORPUS; and**

**(3) DECLINING TO ISSUE A
CERTIFICATE OF APPEALABILITY**

21 Petitioner Climaco Lopez is a state prisoner proceeding pro se and in forma pauperis
22 with a Petition for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254. (ECF No.
23 1.) Petitioner challenges his convictions from the San Diego County Superior Court,
24 obtained as a result of a guilty plea, and the resultant sentence of twenty five years to life
25 in state prison, claiming that he received ineffective assistance of counsel in connection to
26 his plea, and that his plea was not knowing and voluntary. (*Id.* at 6-13.) Presently before
27 the Court is a Report and Recommendation (“R&R”) by United States Magistrate Judge
28 Jill L. Burkhardt. (ECF No. 15.) The Magistrate Judge recommends denying habeas relief

1 based on a finding that the adjudication of Petitioner's claims by the state court is neither
2 contrary to, nor involves an unreasonable application of, clearly established federal law,
3 and is not based on an unreasonable determination of the facts in light of the evidence
4 presented in the state court proceedings. (R&R at 5-18, citing 28 U.S.C. § 2254(d) ("An
5 application for a writ of habeas corpus on behalf of a person in custody pursuant to the
6 judgment of a State court shall not be granted with respect to any claim that was adjudicated
7 on the merits in State court proceedings unless the adjudication of the claim—(1) resulted
8 in a decision that was contrary to, or involved an unreasonable application of, clearly
9 established Federal law, as determined by the Supreme Court of the United States; or (2)
10 resulted in a decision that was based on an unreasonable determination of the facts in light
11 of the evidence presented in the State court proceeding.")) No objections to the R&R have
12 been filed.

13 The Court has reviewed the R&R pursuant to 28 U.S.C. § 636(b)(1), which provides
14 that: "A judge of the court shall make a de novo determination of those portions of the
15 report or specified proposed findings or recommendations to which objection is made. A
16 judge of the court may accept, reject, or modify, in whole or in part, the findings or
17 recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). With the
18 following modifications, the Court adopts the findings and conclusions of the Magistrate
19 Judge, denies the Petition, and declines to issue a Certificate of Appealability.

20 Petitioner presented his claims to the state supreme court in a habeas petition, which
21 was denied in an order that stated: "The petition for writ of habeas corpus is denied. (See
22 People v. Duvall (1995) 9 Cal.4th 464, 474.)" (Lodgment No. 9.) The only other state
23 court to which the claims were presented was the superior court, in a habeas petition which
24 was denied on the basis that Petitioner had not set forth sufficient factual support for his
25 claims. (Lodgment No. 7.) The Magistrate Judge found that the claims were "adjudicated
26 on the merits" within the meaning of 28 U.S.C. § 2254(d), because the state supreme court
27 order was presumed to be a denial on the merits of the claims, and that this Court could
28 "look though" that order and apply § 2254(d) to the last reasoned state court opinion

1 addressing the claims, the superior court order. (R&R at 3 n.1, citing Harrington v. Richter,
2 562 U.S. 86, 89 (2011) (“When a federal claim has been presented to a state court and the
3 state court has denied relief, it may be presumed that the state court adjudicated the claim
4 on the merits *in the absence of any indication or state-law procedural principles to the*
5 *contrary.*”) (emphasis added) and R&R at 4, 6, 14, citing Ylst v. Nunnemaker, 501 U.S.
6 797, 804 (1991) (holding that there is a presumption “[w]here there has been one reasoned
7 state judgment rejecting a federal claim, *later unexplained orders* upholding that judgment
8 or rejecting the same claim rest upon the same ground.”) (emphasis added).)

9 It does not appear that the Ylst presumption applies to the state supreme court order
10 because it is not an unexplained order, but cites to page 474 of the Duvall opinion as its
11 reason for denying relief. It also does not appear that the Harrington presumption applies
12 because a citation to page 474 of the Duvall opinion “may mean ‘the available state
13 remedies have not been exhausted as the California Supreme Court has not been given the
14 required fair opportunity to correct the constitutional violation.’” Medley v. Runnels, 506
15 F.3d 857, 869 (9th Cir. 2007) (en banc) (Opinion of Ikuta, Circuit Judge, dissenting),
16 quoting Harris v. Superior Court, 500 F.2d 1124, 1128 (9th Cir. 1974); see also Pombrio
17 v. Hense, 631 F.Supp.2d 1247, 1251-52 (C.D. Cal. 2009) (noting that a Duvall citation
18 points to a correctable defect and therefore does not support exhaustion). In Medley, unlike
19 here, Respondent did not expressly waive the exhaustion requirement, and the district court
20 was therefore required to determine whether state court remedies still existed. Medley,
21 506 F.3d at 869, citing 28 U.S.C. § 2254(b)(3) (“A State shall not be deemed to have
22 waived the exhaustion requirement or be estopped from reliance upon the requirement
23 unless the State, through counsel, expressly waives the requirement.”) Respondent here
24 has expressly waived the exhaustion requirement by admitting in the Answer that
25 Petitioner’s claims are exhausted. (Ans. at 2.) However, there is no need for this Court to
26 determine whether Petitioner has exhausted state court remedies, or whether his claims
27 were adjudicated on the merits in state court, because it is clear for the reasons set forth in
28 the R&R that the claims fail under a de novo review. See Berghuis v. Thompkins, 560

1 U.S. 370, 390 (2010) (holding that when it is unclear whether AEDPA deference applies,
2 a federal habeas court may conduct a de novo review to deny a petition but not to grant
3 one); see also 28 U.S.C. § 2254(b)(2) (“An application for a writ of habeas corpus may be
4 denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies
5 available in the courts of the State.”)

6 The Magistrate Judge conducted a thorough and well-reasoned analysis of
7 Petitioner’s claims, which included a detailed examination of the state court record as
8 required to address claims challenging the voluntariness of a guilty plea. (R&R at 9-17.)
9 The Magistrate Judge correctly found that Petitioner had failed to demonstrate deficient
10 performance of counsel in connection to the guilty plea, failed to show prejudice arising
11 from the alleged deficient performance, and that the state court record clearly showed that
12 Petitioner’s guilty plea was knowing and voluntary. (Id.) The Court adopts those findings
13 and conclusions, with the modification that even under a de novo review of the claims,
14 Petitioner is not entitled to federal habeas relief for the reasons set forth in the R&R.

15 The Magistrate Judge recommended denying Petitioner’s request for an evidentiary
16 hearing based on the finding that 28 U.S.C. § 2254(d) had not been satisfied. (R&R at 19.)
17 The Court modifies that finding and recommendation and declines to hold an evidentiary
18 hearing because, for the reasons set forth in the R&R, Petitioner’s allegations, even if true,
19 do not entitle him to habeas relief. See Campbell v. Wood, 18 F.3d 662, 679 (9th Cir.
20 1994) (holding that an evidentiary hearing is not necessary where the federal claim can be
21 denied on the basis of the state court record, and where the petitioner’s allegations, even if
22 true, do not provide a basis for habeas relief).

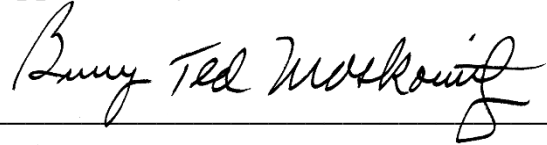
23 Finally, the Court declines to issue a Certificate of Appealability because Petitioner
24 has not shown that “reasonable jurists would find the district court’s assessment of the
25 constitutional claims debatable or wrong.” Slack v. McDaniel, 529 U.S. 473, 484 (2000).

26 **CONCLUSION AND ORDER**

27 The Court **ADOPTS AS MODIFIED** the findings and conclusions of the
28 Magistrate Judge as set forth above, **DENIES** the Petition for a writ of habeas corpus, and

1 **DECLINES TO ISSUE** a Certificate of Appealability. The Clerk shall enter judgment
2 accordingly.

3 DATED: July 10, 2017

A handwritten signature in black ink, reading "Barry Ted Moskowitz", written over a horizontal line.

BARRY TED MOSKOWITZ
UNITED STATES DISTRICT JUDGE